SUPREME COURT, U. S.

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No. 967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

EVERD S. BOYER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	PAGE
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Arguments	3-9
Conclusion	9

CITATIONS

Cases

Baltimore & Ohio R. Co. v. Jackson, 353 U.S. 325	6
Barney v. Staten Island R.T.R. Co., 316 F.2d 38, 40 (2nd Cir., 1965)	6
Boyer v. A.T. & S.F.Ry. Co,, 34 Ill. App. 2d 330, 336	8
Brady v. Terminal Railroad Assn., 303 U.S. 10, 15	3, 6
CB&Q R. Co. v. United States, 220 U.S. 559, 575 (1911)	4
Charleston & W. Car. Ry. Co. v. Thompson, 234 U.S. 576	7
Coray v. Southern Pacific Co., 335 U.S. 520, 522	6
Fairport P & E R. Co. v. Meredith, 292 U.S. 589, 594	6
Frances v. Southern Pacific Co., 333 U.S. 445	7
Jacobson v. New York, N.H.&H. R. Co., 206 F. 2d 153 (1st Cir., 1953)	4
Kansas City Southern R. Co. v. VanZant, 260 U.S. 459	7
Lilly v. Grand Trunk & Western R. Co., 317 U.S. 476, 486	6

PAGE

Lunsford v. L. & N. R. Co., 115 S.E. 2d 310, 311 Tenn. 6

O'Donnell v. Elgin, J&E RR. Co., 338 U.S. 384, 389-390 ..... 3, 5

Shields v. Atlantic Coast Line R., 350 U.S. 318 6

Starr v. Great Northern R. Co., 67 Minn. 18 (inter alia Boyer) 8

St. Louis & Iron Mountain R. Co. v. Taylor, 210 U.S. 281, 297 (1908) 4

Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 41 4

Tipton v. Atchison, Topeka & Santa Fe Ry., 298 U.S. 141, 151 7

United States v. California, 297 U.S. 175, 185 6

United States v. Seaboard ALR Co., 361 U.S. 78, 82 .. 6

Urie v. Thompson, 337 U.S. 163, 189 (1948) 4, 5

Federal Statutes

45 U.S.C. §§ 1-2 ..... 2, 3, 7, 8, 9

49 U.S.C. sec 1(7) 2, 9

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JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether a breach of the Federal Safety Appliance Act (45 USC, Sec. 2) gives rise to a state civil action for compensatory damages in favor of an injured passenger?

2. Whether an interstate traveler riding on a free pass is included within the protective ambit of the Federal Safety Appliance Act?

3. Whether the public policy of Illinois in refusing to enforce an exculpatory provision in a free interstate pass is offensive in any way to the Hepburn Act (49 USC sec. 1(7)).

STATUTES INVOLVED

The statutory provisions are correctly cited in the petition.

ARGUMENT

The opinion of the Illinois Supreme Court is in complete harmony with numerous decisions and pronouncements of this Court relative to the Federal Safety Appliance Acts and the Hepburn Act, and presents no novel or monumental question deserving of review here. The decision below, in logical fashion, merely extends the absolute protection of the Safety Appliance Act enjoyed by railroad ticket passengers to travelers on free passes notwithstanding a purported exculpation of liability from negligence.

I.

The opinion of the Supreme Court of Illinois construing the Federal Safety Appliance Act is correct.

After the 1949 decision of this Court in *O'Donnell* v. *Elgin, J & E RR. Co.*, 338 U.S. 384, the question of an interstate carrier's strict liability for civil damages for a breach of the Safety Appliance Act (45 USC secs. 1, et seq.) is no longer debatable. A violation of that statute with resultant injuries, is in itself an actionable wrong, not predicated upon negligence and imposes absolute liability on the railroad—a liability which it cannot escape by proof of care or diligence, however assiduous. (*O'Donnell* v. *Elgin, J&E RR. Co.*, 338 U.S. 384, 389-390; *Brady* v. *Terminal Railroad Assn.*, 303 U.S. 10, 15).

While the series of Federal Safety Appliance Acts are penal in character, it was held even earlier than the *O'Donnell* case that these are also "remedial" statutes, and that for a failure of railroad equipment to function in accordance with the standard, and mandate of those

statutes, there arises a "liability to make compensation to one who is injured by it" (*CB&Q R. Co.* v. *United States;* 220 U.S. 559, 575 (1911); *St. Louis & Iron Mountain R. Co.* v. *Taylor,* 210 U.S. 281, 297 (1908). This court has also recognized that "liability to private suit is or may be as potent a deterrent as liability to public prosecution" under the Federal Safety Appliance Acts, (*Texas & Pac. Ry. Co.* v. *Rigsby,* 241 U.S. 33, 41), and thus has sanctioned the principle that a breach of a penal statute gives rise to a civil remedy.

Petitioner argues *ad terrorem* in asserting that the Illinois courts holding in *Boyer* "would expand the original jurisdiction of the Federal courts" on the theory that actions could be predicated on a breach of the Federal Safety Appliance Acts. (Pet. 7-8). Petitioner cites *Jacobson* v. *New York, N.H.&H. R. Co.,* 206 F. 2d 153 (1st Cir., 1953), and *Urie* v. *Thompson,* 337 U.S. 163, 189 (1948). The short answer is that the Illinois Court recognized only that a *state* cause of action arises from the breach of the Federal statute, not necessarily a federal cause of action "and consequently one in whose favor such cause of action has arisen must look to the State courts to implement his right of action." (38 Ill. 2d 31, 36 (1967)). The *Jacobson* case cited by petitioner, as well as the Illinois high court, notes that (206 F.2d 153 at 155) "in terms at least the Safety Appliance Acts confer no right of action for damages" [as the Federal Employers' Liability Act expressly does] *but observes that a breach of the Safety Appliance Acts can be the basis for a common law suit.* Since FELA expressly confers a right of action in favor of railroad employees, federal jurisdiction independently of diversity exists, but a breach of the Safety Appliance Acts was held *not* to raise a federal question

to support the district court's jurisdiction. Further, the court in *Jacobson* refused to extend the protection of the Safety Appliance Acts to an *intra state* passenger.

Urie v. *Thompson,* 337 U.S. 163, cited by petitioner, involved the construction of the Statute of Limitations under FELA, and holds only that silicosis claimed to have been contacted by the plaintiff, a former fireman, was within the coverage of that statute.

Nothing in *Urie* is in conflict with the later holding in *O'Donnell* that the duty imposed by the Safety Appliance Acts for the safe operation of specific railroad equipment is an "absolute one" and actionable without resort to negligence concepts.

The Illinois Supreme Court declares "that the Federal Safety Appliance Act is as much a part of the law and policy of the States as are their own laws enacted by the State Legislatures." (38 Ill. 2d 31, 36). Hence, *Boyer* is hardly a precedent for expanding the original jurisdiction of Federal District Courts and the latter question does not even arise in the instant case.

II.

Passengers, as well as railroad employees, are protected by the Safety Appliance Acts.

Contrary to contentions of petitioner, a cause of action for a breach of the Safety Appliance Acts accrues to members of the traveling public as well as to railroad employees. Not only does the title of the original Safety Appliance Act explicity denominate it as a statute "to protect the safety of employees *and travelers* upon rail-

roads'"* but pronouncements of this Court recognized a much broader protection of the Act than argued for by petitioner. Thus, in *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, Mr. Justice Black, speaking for the Court said, at p. 522:

> "And this Act fairly interpreted, must be held to protect *all who need protection* from dangerous results due to maintenance or operation of Congressionally prohibited defective appliances." (Emphasis added).

In a series of cases involving *non-employees,* this Court unhesitatingly applied the protection of the Safety Appliance Acts; *viz. Brady* v. *Terminal R. Assn.*, 303 U.S. 10 (plaintiff not an employee of the defendant); *Shields* v. *Atlantic Coast Line R.*, 350 U.S. 318 (plaintiff an employee of an independent contractor); *Baltimore & Ohio R. Co.* v. *Jackson,* 353 U.S. 325 (dictum that Safety Appliance Acts extending to "the public"); *United States* v. *Seaboard ALR Co.*, 361 U.S. 78, 82, (protection "to those who ride the trains, particularly the men who operate them.") to the same effect *Fairport P & E R. Co.* v. *Meredith,* 292 U.S. 589, 594; *United States* v. *California,* 297 U.S. 175, 185; *Lilly* v. *Grand Trunk & Western R. Co.*, 317 U.S. 476, 486. The lower courts, as well, have declared that the benefits of the Safety Appliance Acts are not restricted to railroad crewmen, but extend to the public. *Jacobson* v. *N.Y., N.H. & H. Ry.*, 206 F. 2d 153, 155 (1st Cir.); *Barney* v. *Staten Island R.T.R. Co.*, 316 F. 2d 38, 40 (2nd Cir. 1965); *Lunsford* v. *L.&N. R. Co.*, 115 S.E. 2d 310, 311 Tenn.).

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* Title to Chap. 45 U.S.C., which contain the Safety Appliance Acts reads as follows: "CHAPTER ONE—SAFETY APPLIANCES AND EQUIPMENT ON RAILROAD CARS AND PROTECTION OF EMPLOYEES AND TRAVELERS."

III.

The public policy of Illinois in refusing to enforce an exculpatory provision on a free interstate railroad pass is not offensive to the Hepburn Act.

Waiver provisions on a free pass issued pursuant to the Hepburn Act may be effective to exculpate a railroad from liability for "ordinary negligence". Where, however, the theory of liability is not predicated upon negligence, but upon a breach of an absolute duty imposed by statute, the provisions of the pass do not exonerate the defendant from injuries suffered by the railroad's violation of Section 2 of the Safety Appliance Act. Since, "the absolute duty imposed [by the Safety Appliance Acts] necessarily supersedes the common law duty" of the railroad (*Tipton* v. *Atchison, Topeka & Santa Fe Ry.*, 298 U.S. 141, 151) considerations of negligence are irrelevant and the effect of the waiver provisions of the instant pass cannot be analyzed in terms of the carrier's common law duty.

Nothing in the decisions of the courts below in *Boyer* offends the Hepburn Act in the slightest degree. That Act contains no provisions regarding the terms or conditions of free passes. It does not purport to define the nature of such passes or the validity of waivers of liability contained in them. Cases cited by petitioner, *Kansas City Southern R. Co.* v. *VanZant*, 260 U.S. 459; *Charleston & W. Car. Ry. Co.* v. *Thompson*, 234 U.S. 576, and *Frances* v. *Southern Pacific Co.*, 333 U.S. 445, concern only the validity of a waiver of liability where the railroad is charged with negligence, not where it is accused of a breach of an absolute duty under a Federal public safety statute.

Petitioner seems incapable of recognizing that culpability for a breach of an absolute safety standard is more serious than guilt of simple negligence and that therefore the consequences are different in respect to the waiver provisions on a free pass.

Since Congress made no distinction in the Safety Appliance Acts between fare-paying and gratuitous "travelers", the absolute, unqualified duty of a railroad to operate safe equipment extends alike to both types of riders. The same public policy which vitiates a waiver of liability for a breach of Safety Appliance Acts on a railroad ticket, operates as well to invalidate such an exculpation on a free pass. This is the plausible underlying rationale for the decision in *Boyer* by the Illinois court. Nothing more is involved than the extension to a pass holder of the railroad's absolute duty to a ticket holder. Hence, the court properly therefore applied the principle that "one may not by contract immunize himself from civil liability, where to do so would violate public policy." *Boyer* v. *A.T.&SF Ry. Co.*, 34 Ill. App. 2d 330, 336, citing *inter alia*, *Starr* v. *Great Northern R. Co.*, 67 Minn. 18.

IV.

The Illinois decisions are in accord with sound precedent.

Contrary to the contention of petitioner that the "decision below is in conflict with . . . decisions by the Supreme Court of the United States" (Pet. 9) it may be pointed out that the decisions of both the Illinois Supreme and Appellate Courts are completely consonant with established legal principles and rules. In a note in 96 A.L.R. 2d 406, entitled "Persons Other Than Employee Riding On Railroad On A Free Pass, As Entitled to Benefits Of Federal Safe-

ty Appliance Act", the editor, annotating, 34 Ill. App. 2d 330, observes at p. 407:

> "While no other case has been found in which this specific point was in issue, there can be little doubt as to the soundness of the decision reached, in view of the fact that it is but an application of specific facts of well established legal principles and rules."

CONCLUSION

In conclusion, it is respectfully submitted that the judgment of the Illinois Supreme Court, and the two Appellate Court decisions, are clearly correct. No new or important issue is presented. The application of numerous decisions of this Court in respect to the Safety Appliance Acts and the Hepburn Act were properly made by the Courts below and requires no further elucidation by this Court.

It is therefore respectfully submitted that the PETITION FOR WRIT OF CERTIORARI should be denied.

Respectfully submitted,

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